No. 90-1530

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Supreme Court of the United States

October Term, 1990

In re: PAN AM CORPORATION; PAN AMERICAN WORLD AIRWAYS, INC.; PAN AM SHUTTLE INC.; PAN AM EXPRESS, INC.; PAA CORP.; ALLMAT INTERNATIONAL, INC.; ALERT MANAGEMENT SYSTEMS, INC.; PAN AM COMMERCIAL SERVICES, INC.,

Debtors in Possession-Petitioners.

SECTION 1110 PARTIES; OMNIBUS SECTION 1110 PARTIES, PS GROUP, INC.; GRAND CENTRAL PARTNERS NO. 1; GRAND CENTRAL PARTNERS NO. 2; GRAND CENTRAL PARTNERS NO. 3; UNITED STATES AIRLEASE, INC.; CL AIRCRAFT VII, INC; C.I.T. LEASING CORPORATION; THE CIT GROUP/EQUIPMENT FINANCING, INC.; UNITED STATES TRUST COMPANY OF NEW YORK, as indenture trustee; NMB LEASE NV; ORIX CORPORATION; NISSHO IWAI CORPORATION;

(Caption continued on inside cover)

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Second Circuit

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Respondents,

- v. -

PAN AM CORPORATION,

Petitioner.

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QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in affirming the order of the District Court for the Southern District of New York that section 1110 of the Bankruptcy Code, 11 U.S.C. § 1110, by its unqualified use of the terms "lessor," "leased" and "lease" includes within its protection lessors that have leased aircraft or equipment to a certificated air carrier in connection with a sale-leaseback transaction which did not result in the acquisition by the air carrier of aircraft or equipment "new" to its fleet?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, all amici curiae (except Continental Airlines, Inc.) submitted briefs to the Court of Appeals for the Second Circuit in opposition to Debtors' appeal of the Opinion and Order of the District Court for the Southern District for New York.*

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* The following information is provided pursuant to Rule 29.1 of this Court: Evergreen International Airlines, Inc. identifies Evergreen International Aviation, Inc. as its parent company and has no nonwholly owned subsidiaries; Cobblestone Corporation identifies its parent companies as Franklin Leasing Corporation, Redes Corporation and Redes Holding Corporation and has no nonwholly owned subsidiaries; U.S. Concord, Inc. identifies Concord Leasing Inc. as its parent company and has no nonwholly owned subsidiaries; Greyhound Financial Corporation identifies Dial Corp. as its parent company and has no nonwholly owned subsidiaries; De National Investeringsbank N.V. has no parent companies and no nonwholly owned subsidiaries; Aeron Aviation Corporation has no parent companies and identifies Newair Flight, Inc., Aeron Leasing International, Inc. and Aero Leasing (USA), Inc. as its nonwholly owned subsidiaries; Credit Lyonnais/PK AIRFINANCE identifies Credit Lyonnais and Nord Banken as its parent companies and has no nonwholly owned subsidiaries; PS Group Inc. has no parent companies and identifies Statex Petroleum, Inc., USTravel Systems Inc. and Recontek, Inc. as its nonwholly owned subsidiaries; Grand Central Partners No. 1 identifies GATX GCP Corporation, DMC Aircraft Corporation No. 1 and SPB I Corp. as its general partners and has no nonwholly owned subsidiaries; Grand Central Partners No. 2 identifies GATX GCP Corporation, DMC Aircraft Corporation No. 2 and SPB II Corp. as its general partners and has no nonwholly owned subsidiaries; Grand Central Partners No. 3 identifies GATX CP Corporation, DMC Aircraft Corporation No. 3, SPB III Corp. as its general partners and has no nonwholly owned subsidiaries; and IBJ Schroder Leasing Corporation identifies IBJ Schroder Bank & Trust Company, The Industrial Bank of Japan, Ltd. and Schroders, Inc. as its parent companies and has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

Background 1

Proceedings Below 1

A. The Bankruptcy Court 1

B. The District Court 2

C. The Court of Appeals 3

D. This Court 3

REASONS FOR DENYING THE WRIT 3

Introduction 3

I. THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI BECAUSE THE ORDER BELOW DOES NOT RAISE SPECIAL AND IMPORTANT REASONS UNDER 28 U.S.C. § 1254(1) WARRANTING THIS COURT'S REVIEW . . . 4

PAGE

A. Letting The Lower Court's Judgment Stand Would Provide Certainty And Predictability To Section 1110 Transactions 4

B. Debtors' Reading Of Section 1110 Defies Logic And Only Creates Uncertainty And The Likelihood Of Potential Litigation 7

C. Debtors Themselves Are Unable To Apply Consistently The Construction Of Section 1110 They Urge Upon This Court 8

D. The Application of Section 1110 Does Not Conflict With Legislative Intent Because Congress Clearly Recognized The Impact Of Section 1110 On Airline Reorganizations When It Enacted That Section 9

II. THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER COMPELLING REASON WARRANTING THIS COUPT'S REVIEW 12

A. This Case Involves A Straightforward Application Of Statutory Construction 12

PAGE

1. The Application Of The Plain Meaning Rule Established By This Court Mandates The Construction That The Clear And Unambiguous Language Of Section 1110 Apply Without Limitation To All Lessors 12

2. The Terms "Lessor," "Leased" And "Lease" Must Be Given Their Plain And Ordinary Meaning, Separate From The Terms "Purchase Money Equipment Security Interest" And "Conditional Sale" 16

B. The Second Circuit's Decision That Section 1110 Is Clear And Unambiguous On Its Face And Applies To All Lessors Is Not In Conflict With Any Other Circuit Court Decision 19

C. The Literal Meaning Of Section 1110 Is Consistent With The Congressional Purpose And Its Implementation 20

1. Background 20

2. The Legislative History Of Section 1110 Is Fully Consistent With The Recognition Of Nonacquisition Sale-Leasebacks As Section 1110 Transactions 22

PAGE

3. Nothing In The Legislative History Warrants Departure From The Plain Meaning Of Section 1110 23

D. The Petition Does Not Present Any Issues Of Compelling Importance Warranting This Court's Review 26

III. THIS COURT DOES NOT NEED TO SETTLE THE QUESTION PRESENTED BECAUSE ALL AUTHORITY HOLDS THAT NON-ACQUISITION SALE-LEASEBACK TRANSACTIONS ARE ENTITLED TO THE PROTECTIONS OF SECTION 1110 26

IV. THE APPELLATE COURT'S DECISION IS CORRECT 29

CONCLUSION 30

APPENDIX:

Appendix A: Opinion of the District Court for District of Delaware in *In re Continental Airlines, Inc.*, 91 Civ. 58 (RSG), slip op. (D. Del. March 26, 1991) 1a

TABLE OF AUTHORITIES

Cases PAGES

Braniff, Inc. v. Toren (In re Braniff, Inc.), 110 Bankr. 980 (Bankr. M.D. Fla. 1990) 7, 13, 14, 27

California Chieftan v. Air Vermont, Inc. (In re Air Vermont, Inc.), 761 F.2d 130 (2d Cir. 1985) 13, 14, 15, 26

Caminetti v. United States, 242 U.S. 470 (1917) . . . 16

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) 15

Crooks v. Harrelson, 282 U.S. 55, 51 S.Ct. 49, 75 L.Ed. 156 (1930) 15

Demarest v. Manspeaker, __U.S.__, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) 13, 15, 26

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 12

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 4

In re Airlift Intern., Inc., 761 F.2d 1503 (11th Cir. 1985) 22

In re Chateaugay Corp., 920 F.2d 183 (2d Cir. 1990) 13, 26

PAGES

In re Continental Airlines, Inc., No. 91 Civ. 58 (RSG), slip op. (D. Del. March 26, 1991) 13, 17, 18, 26

Jarecki v. G.D. Searle & Co., 367 U.S. 303, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961) 18

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) 15

Keller v. Adams-Campbell Co., 264 U.S. 314 (1924) 20

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 20

Mansell v. Mansell, 490 U.S. 581 (1989) 26

Rodriguez v. United States, 480 U.S. 522 (1987) . . . 16

Russell Motor Car Co. v. United States, 261 U.S. 514, 43 S.Ct. 428, 67 L.Ed. 778 (1923) 17

Smith v. Fidelity Consumer Discount Co., 898 F.2d 907 (3d Cir. 1990) 26

Sun Oil Co. v. C.I.R., 562 F.2d 258 (3d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) 5

Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) 15

United States v. American Trucking Ass'ns, Inc., 310 U.S. 534 (1940) 15

PAGES

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) 12, 15, 16, 26

West Virginia University Hospitals, Inc. v. Casey, ___ U.S. ___, 111 S.Ct. 1138 (1991) 16, 26

Wisconsin Elec. Co. v. Dumore Co., 282 U.S. 813 (1931) 20

Yorkshire Ry. Wagon Co. v. Maclure, 21 Ch. D. 309 (1882) 5

Statutes and Rules

11 U.S.C. § 362 . . . . . 5, 10
11 U.S.C. § 362(b)(10) 25
11 U.S.C. § 363(e) 10
11 U.S.C. § 365 . . . . . 5, 10
11 U.S.C. § 365(b)(2) 11
11 U.S.C. § 365(d)(3) 11, 25
11 U.S.C. § 365(d)(4) 25
11 U.S.C. § 365(h) 24
11 U.S.C. § 502(a)(6) 24
11 U.S.C. § 503(b)(1) 11
11 U.S.C. § 1110 . . . . . *Passim*
11 U.S.C. § 1168 . . . . . 5, 25
26 U.S.C. § 168 19
28 U.S.C. § 1254 4
28 U.S.C. § 1254 (1) 4
Sup. Ct. R. 10 . . . . . 4, 20

PAGES

Legislative History

H.R. Rep. No. 1283, 74th Cong., 1st Sess. 4, 6 (1935) 20

H.R. Rep. No. 944, 85th Cong., 1st Sess. 1, 2 *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926, 1927 . . . . . 20, 21, 22, 28

H.R. Rep. No. 595, 95th Cong., 1st Sess. 239-40, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6199 . . . . . 19, 21, 23

H.R. Rep. No. 595, 95th Cong., 2d Sess. 238-40, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6198-99 . . . . . 5, 9, 10

S. Rep. No. 1032, 85th Cong., 1st Sess. 1, 2 . . . . 20, 21

S. Rep. No. 989, 95th Cong., 2d Sess. 116-7, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5902-3 24

Treatises

2A *Sutherland Statutory Construction*, § 47.16 (4th ed. 1984) 17

5 *Collier on Bankruptcy* ¶ 1110.01 (L. King 15th ed. 1990) 22

PAGES

B. Fritch, A. Reisman & I. Shrank, *1 Equipment Leasing and Leverage Leasing* 834 (3d Ed. 1988) 25

Gerstell & Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1, 24-25 (1987) 13, 21

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Respondents, Evergreen International Airlines, Inc., Cobblestone Corporation, U.S. Concord, Inc., Greyhound Financial Corporation, De Nationale Investeringsbank N.V., Aeron Aviation Corporation, Credit Lyonnais/PK AIRFINANCE, PS Group, Inc., Grand Central Partners No. 1, Grand Central Partners No. 2, Grand Central Partners No. 3 and IBJ Schroder Leasing Corporation ("Respondents"), respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of its opinion entered on April 2, 1991 (the "Petition").[1]

STATEMENT OF THE CASE

Background

The Court of Appeals for the Second Circuit, the District Court for the Southern District of New York and the Bankruptcy Court for the Southern District of New York have all rejected the argument in the Petition that the unqualified terms "lessor," "leased" and "lease" as used in section 1110 of chapter 11, title 11 of the United States Code (the "Bankruptcy Code") should be construed to exclude from the coverage of section 1110 all leases that do not result in the acquisition by Debtors of aircraft or equipment "new" to Debtors' fleet.

Proceedings Below

A. The Bankruptcy Court

On February 22, 1991, petitioners, Pan Am Corporation and affiliated entities ("Debtors"), filed a motion in the United States Bankruptcy Court for the Southern District of New York, seeking a determination, *inter alia*, that sale-leaseback transactions entered into between Respondents and certain Debtors were not entitled to the protection of section 1110 (the "section 1110 motion"). After a hearing on March 7, 1991, the Bankruptcy Court denied Debtors' section 1110

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1. "Pet. ___" refers to the Petition.

motion and rendered a bench decision, followed by a written decision entered on March 18, 1991, in which it held, *inter alia*, that the term "lessors" as used in section 1110 includes lessors under nonacquisition sale-leaseback transactions. On March 8, 1991, the Bankruptcy Court entered an order (the "section 1110 order"), which provides in paragraph five thereof as follows:

> Transactions designated by the Debtors as "non-acquisition sale/leaseback transactions" are not disqualified from the protection of Section 1110 solely because they are "non-acquisition sale/leaseback transactions".

A. 470.[2]

B. The District Court

Debtors filed a Notice of Appeal in the District Court for the Southern District of New York and sought expedited review, together with a stay of the order pending the appeal. The District Court granted an expedited appeal, but denied a stay pending appeal "for failure to show likelihood of success on the merits." A. 472. On March 18, 1991, the District Court rendered its opinion and order, holding that section 1110 is unambiguous and, therefore, applies to *all* lessors, including those who lease aircraft and equipment pursuant to nonacquisition sale-leaseback transactions.

> The terms "lessor," "leased" and "lease" are not modified in any way which suggests that the statute was not meant to apply to lessors in a sale-leaseback transaction.

Pet. 17a.

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2. "A. ____" refers to the Appendix filed in connection with the decision below.

C. The Court of Appeals

On March 19, 1991, Debtors received permission of the Court of Appeals for the Second Circuit for expedited review and were granted a stay of the District Court's order pending such review. After oral argument on April 2, 1991, the Court of Appeals affirmed, in a *per curiam* opinion, but stayed its order until 12:00 noon, Friday, April 5, 1991, to permit Debtors to seek a stay from this Court.

D. This Court

On April 5, 1991, Justice Thurgood Marshall denied Debtors' application for a stay.

REASONS FOR DENYING THE WRIT

Introduction

Debtors' construction of section 1110 is totally without merit and *certiorari* should be denied. Section 1110 is clear and unambiguous on its face and the plain and ordinary meaning of such section is not at odds with the legislative intent. Using a principle of statutory construction established by this Court, five federal courts have uniformly so held. Debtors have failed to demonstrate any support for their analysis other than a short bench decision of a Bankruptcy Judge which has been reversed. Moreover, the judicial rewriting of section 1110 that Debtors seek would have a chilling effect on the raising of low cost capital by the airline industry, generate myriad issues which, undoubtedly, would leave the law in confusion and open a floodgate of potential litigation. Accordingly, as demonstrated below, there is no reason for this Court to grant *certiorari*.

I. THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI BECAUSE THE ORDER BELOW DOES NOT RAISE SPECIAL AND IMPORTANT REASONS UNDER 28 U.S.C. § 1254(1) WARRANTING THIS COURT'S REVIEW

28 U.S.C. § 1254 provides, in pertinent part, as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 1254(1) (1991).

As the Supreme Court Rules provide, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. Indeed, it is well-settled that *certiorari* jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accordingly, as demonstrated below, on the state of the record before this Court, there are no reasons in this case warranting this Court's review; nor does any lack of uniformity exist in any decisions that have been rendered to date.

A. Letting The Lower Court's Judgment Stand Would Provide Certainty And Predictability To Section 1110 Transactions

Section 1110 of the Bankruptcy Code provides special protection to certain lenders and *all* lessors of qualified equip-

ment to certificated air carriers.[3] Section 1110 and its predecessors have permitted lessors and conditional vendors (and, from 1978, holders of purchase money equipment security interests), to exercise their contractual rights to repossess their leased or financed equipment, notwithstanding otherwise applicable provisions of the Bankruptcy Code or the former Bankruptcy Act.

Since at least 1957, financiers have engaged in aircraft sale-leaseback transactions and relied on the benefits of section 1110 and its predecessors. S.A. 184-187.[4] The legislative history expressly shows that Congress was keenly aware that financiers in the airline industry, as well as financiers in the railroad and water transport industries, greatly relied upon such benefits in extending financing to such industries. H.R. Rep. No. 595, 95th Cong., 2d Sess. 238-39, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6198.[5]

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3. Contrary to Debtors' assertion, section 1110 is not an anomalous provision of the Code because it bypasses the automatic stay. Pet. 3. In fact, section 362 of the Bankruptcy Code, which imposes the automatic stay and which Debtors have erred in citing as section 365 (Pet. 3), contains 17 exceptions to the automatic stay after the 1990 amendments to the Bankruptcy Code. Section 1168 of the Bankruptcy Code also provides certain financiers of railroad equipment protection analogous to that provided in section 1110. Moreover, section 1110 was enacted for the benefit of air carriers (Pet. 11), and Debtors did not complain about the "anomaly" of section 1110 when they enjoyed its benefits outside of chapter 11 in their dealings with lessors and lenders who relied on the protections the statute provides.

4. "S.A. ____" refers to the Supplemental Appendix filed in connection with the decision below.

5. Sale-leaseback transactions are of an ancient vintage. *Yorkshire Ry. Wagon Co. v. Maclure*, 21 Ch. D. 309 (1882). *See, e.g., Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) ("we recognize that sale-leaseback arrangements play a useful and accepted role in our economy").

Sale-leaseback transactions are currently the predominant form of aircraft leasing transactions employed in the United States airline industry and provide a major source of reliable low-cost financing to the industry.[6] S.A. 185-186. Indeed, billions of dollars in financing are provided every year through sale-leaseback transactions, accounting for a substantial portion of the financing of the industry's aircraft fleet. S.A. 184-185. Because of the benefits of sale-leaseback transactions and the protections provided by section 1110, domestic airlines are able to compete with other borrowers in the world capital markets at a time when credit is scarce. If the special protections accorded by section 1110 were no longer available to financiers, the uncertainty of whether financiers would have any predictable remedy would have a major impact on the cost of equipment financing to the airline industry and, in all likelihood, would make sale-leaseback transactions prohibitively expensive, if at all feasible. Contrary to Debtors' assertions, any reversal of the Court of Appeals' decision would further the interests of only chapter 11 debtors that already enjoyed the benefits of section 1110. Pet. 13. However, the consequences of the judicial rewriting of section 1110 that Debtors seek would be severely adverse to the airline industry, would no doubt increase dramatically the industry's cost of financing and would dry up the current sources of capital upon which the industry is dependent for its continued growth, modernization and self-sufficiency.

Moreover, as District Judge Mukasey noted, the folly of Debtors' position is brought into sharp focus when it is realized that their position does not preclude the application of

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6. Air carriers favor these transactions to avoid debt on their balance sheets when they can no longer use tax benefits associated with ownership of the property and to procure financial benefits when the cost of leasing is lower than the cost of borrowing. *See* Kruft, *Leveraged Aircraft Leases: The Lender's Perspective*, 44 Bus. Law. 737, 738 (1989).

section 1110 to transactions that are functionally equivalent to nonacquisition sale-leaseback transactions, but only makes obtaining such protection more expensive and cumbersome. Pet. 24a. For example, selling an aircraft to a purchaser and leasing a virtually identical aircraft from that purchaser is no different than a conventional sale-leaseback. Under Debtors' facile analysis, only the first transaction involving a sale and lease, and not the sale-leaseback transaction, would have the benefit of section 1110. The bottom line is that Debtors would be in the same position as if they had done a conventional sale-leaseback, except that Debtors' transaction costs would be much higher. Such a result should not be sustained by this Court and denial of *certiorari* seems compelling.

B. Debtors' Reading Of Section 1110 Defies Logic And Only Creates Uncertainty And The Likelihood Of Potential Litigation

The judicial rewriting of section 1110 that Debtors seek, if adopted, would create confusion by generating myriad issues and leaving the law in disarray. As District Judge Mukasey recognized:

> The distinction Pan Am would draw, based on legislative history, between sale-leasebacks and conventional leases would generate numerous additional issues that could not be resolved by that legislative history. In the future, there would likely be litigation on whether the words Pan Am hopes to read into the statute through references to selected legislative history limit the protection of § 1110 to lessors of brand new equipment, lessors of equipment new to the debtor airline, lessors of equipment new to the debtor airline and also new to any predecessor of the debtor airline, *see Braniff*, 110 B.R. at 985, or some other category. In addition, it would be unclear whether the statute

> applies to lease renewals if the equipment was new to the airline at the beginning of the initial lease term. As mentioned, Pan-Am concedes for purposes of this motion that § 1110 applies to leases of used equipment so long as that equipment is new to the airline. Yet this concession itself does not seem to arise from anything in the legislative history. . . . [T]he benefit sought to be achieved by a statute like § 1110 -- the prospect of a quick and predictable remedy that encourages potential financiers to be forthcoming -- will be lost in a miasma of potential litigation.

Pet. 23a-24a. (Footnote omitted).

There is no reason why this Court should grant *certiorari* where any determination other than affirmance of the judgment below would create issues rather than resolve an issue that, in our view, is nonexistent because of the clarity of section 1110.

C. Debtors Themselves Are Unable To Apply Consistently The Construction Of Section 1110 They Urge Upon This Court

As fully explained by the District Court, Debtors have urged upon this Court a contorted construction of section 1110 that has no basis for a consistent application. Debtors have patently failed to demonstrate that their proposed construction can be applied -- and, indeed, Debtors themselves are unable to apply their construction -- in a uniform manner consistent with what they perceive to be the legislative purpose.

For example, the Bankruptcy Court held that lease extensions and renewals and replacement leases are entitled to the protection of section 1110. Pet. 48a. Debtors appealed the section 1110 order with respect to sale-leaseback transactions

but did not challenge the section 1110 order on lease extensions or renewals or replacement leases, although all such leases involve equipment that is *not* new to Debtors. S.A. 473. Debtors have completely failed to provide a rational explanation for the inconsistent application of the very principle they now ask this Court to validate.

Debtors have also failed to explain the basis for their contention that section 1110 requires that leased aircraft need not be new or modern but only that such aircraft, although used, old or even obsolete, be "new" to Debtors. Debtors' attempt to find support for this contention in the legislative history completely fails. As noted by Judge Mukasey, the construction urged by Debtors is not founded upon anything in the legislative history. Pet. 24a. It is incomprehensible how Debtors can urge that the purpose of section 1110 is to provide for new and modern equipment and also argue that such purpose is satisfied so long as the leased equipment is "new" to Debtors.

D. The Application of Section 1110 Does Not Conflict With Legislative Intent Because Congress Clearly Recognized The Impact Of Section 1110 On Airline Reorganizations When It Enacted That Section

Congress was acutely aware of the impact of the special protections afforded to lessors of aircraft under section 116(5) of the former Bankruptcy Act, the predecessor to section 1110, which permitted financiers to repossess their collateral immediately without regard to the filing or pendency of a reorganization case. H.R. Rep. No. 595, 95th Cong., 2d Sess. 239-40, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6198. The legislative history clearly reveals that the enactment of section 1110 was, in fact, intended to be a *compromise* between the reorganization policy of the Bankruptcy Code and a lessor's interest in protecting its

investment. To mitigate the immediate impact of section 116(5) of the former Bankruptcy Act, Congress struck a balance between such competing interests by giving the debtor 60 days to determine whether particular leased aircraft and equipment are essential to its reorganization efforts and by leaving the choice to the debtor of whether to return equipment to the lessor or to make payment and retain the equipment. Thus, Congress explained that:

> The protection afforded the financier is similar to that contained in other sections of the bill governing use of collateral by the estate and the treatment of executory contracts and unexpired leases. . . . Under those sections, . . . [a] lessor is entitled to lease payments under the terms of the lease, and to the curing of past defaults, if the trustee elects to assume a lease. . . . *In the case of a lease, the protection is the same afforded other lessors, but the trustee is required to make a decision within 60 days of the order for relief. This should not impose an undue burden on the trustee, because transportation equipment in any major transportation company reorganization is one of the most important assets. A decision must be made quickly if the business is to be kept operating and be rehabilitated.*

H.R. Rep. No. 595, 95th Cong., 2d Sess. 239-40, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6199 (emphasis added). The foregoing language clearly reveals that Congress considered that the effect of section 1110 on the reorganization of the debtor would be the same as the effect of the sections of the Bankruptcy Code governing the treatment of executory contracts and unexpired leases (*e.g.*, §§ 362, 363(e) and 365), notwithstanding that, under section 1110, the debtor would have a strict 60-day period in which to decide whether to cure defaults with respect to its aircraft and equipment. Moreover, that language also clearly reveals that

Congress believed that lessors of aircraft deserved the same protection afforded other lessors under the Bankruptcy Code. For example, the strict 60-day decision period imposed on the debtor with respect to a lease of aircraft is similar to the time restrictions imposed upon the debtor with respect to non-residential realty leases.[7] Yet, the importance of the airline transportation industry, the potential impact on the public at large, the sheer dollar amount of the aircraft and equipment at stake, and the rate at which such equipment deteriorates in value through usage present far greater exigencies than those encountered with respect to commercial realty leases.

In sum, Debtors have failed to present any special and important reasons in the Petition that would require review by this Court. Indeed, as demonstrated below, the only issue raised in the Petition is the simple issue of statutory construction, which neither raises any Constitutional concerns nor involves any conflict among the courts of appeals warranting this Court's review.

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7. Section 365(d)(3) of the Bankruptcy Code states in relevant part:

> (3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, *but the time for performance shall not be extended beyond such 60-day period*. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

II. THERE IS NO REASON FOR THIS COURT TO GRANT CERTIORARI BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER COMPELLING REASON WARRANTING THIS COURT'S REVIEW

A. This Case Involves A Straightforward Application Of Statutory Construction

1. The Application Of The Plain Meaning Rule Established By This Court Mandates The Construction That The Clear And Unambiguous Language Of Section 1110 Apply Without Limitation To All Lessors

Section 1110 protects the right of a "lessor" of aircraft and aircraft equipment "leased" to a certificated air carrier to take possession of such equipment pursuant to the terms of its "lease." Contrary to Debtors' assertions, the plain and ordinary meaning of the terms "lessor," "leased" and "lease" as used in section 1110 is neither ambiguous nor qualified by any restrictive language in the statute.

Finding that the question presented here is a straightforward application of statutory construction, the District Court reached its conclusion that the terms "lessor," "leased" and "lease" do not implicitly or explicitly exclude nonacquisition sale-leaseback transactions by applying equally straightforward principles of statutory interpretation:

> "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'"

United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S.

> 564, 571 (1982)) (brackets in original). *See also Demarest* v. *Manspeaker*, 111 S.Ct. 599, 604 (1991); *In re Chateaugay Corp.*, 920 F.2d 183, 184 (2d Cir. 1990).

Pet. 16a.

The District Court, concluding that such terms are clear and unambiguous and must be literally construed, followed the mandate of the Court of Appeals for the Second Circuit:

> This basic rule of statutory construction has been applied to interpret the very statute at issue here, §1110. *In re Air Vermont*, 761 F.2d 130, 134 (2d Cir. 1985) ("[where] the statute is unambiguous on its face . . . the statute's literal meaning must be applied" unless "there is something to make plain the intent of Congress that the letter of the statute is not to prevail"). In *Air Vermont*, the Second Circuit, noting that "the statute's literal meaning must be applied," reversed an order of the bankruptcy court which read into §1110 an additional, unstated statutory requirement that a conditional seller perfect its security interest by filing its contract with the Federal Aviation Administration. *Id.* at 134.

Pet. 17a. *Accord In re Continental Airlines, Inc.*, 91 Civ. 58 (RSG), slip op. (D. Del. March 26, 1991) (literal reading of section 1110 not at odds with Congressional purpose)[8]; *Braniff, Inc. v. Toren* (*In re Braniff, Inc.*), 110 Bankr. 980, 985 (Bankr. M.D. Fla. 1990) (literally construed, section 1110 applies to *all* leases); *see also* Gerstell & Hoff-Patrinos,

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8. The *Continental* decision has been appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals heard oral argument on May 1, 1991. No decision has been made.

Aviation Financing Problems Under Section 1110 of the Bankruptcy Code, 61 Am. Bankr. L.J. 1, 24-25 (1987).

Moreover, Debtors have urged the Bankruptcy Court, the District Court and the Court of Appeals judicially to rewrite section 1110 by superimposing an acquisition element on leases in derogation of the plain meaning of the Statute. Each of those courts unequivocally rejected Debtors' request because courts may not superimpose additional conditions on the requirements specified in section 1110. *Braniff, Inc. v. Toren (In re Braniff, Inc.)*, 110 Bankr. 980, 984 (Bankr. M.D. Fla. 1990) (no acquisition element for leases may be imposed as an additional requirement); *California Chieftan v. Air Vermont, Inc. (In re Air Vermont, Inc.)*, 761 F.2d 130, 134 (2d Cir. 1985) (perfection of a security interest may not be superimposed on the requirements specified in section 1110).

In *Air Vermont*, the Court of Appeals for the Second Circuit faced the question of whether a conditional vendor that had failed to perfect its security interest in an aircraft by recording the contract was entitled to repossess such aircraft pursuant to section 1110. *Id.* at 130. The debtor argued that the right of a secured party with a purchase money equipment security interest in aircraft to take possession should be construed to apply only to perfected security interests. The Court of Appeals, however, found that section "1110 makes no mention whatsoever that a conditional sales contract must be recorded in order for § 1110 to apply. *Rather, § 1110, on its face, empowers a vendor of aircraft pursuant to a conditional sales contract to repossess the aircraft provided only that elements of the section are satisfied.*" *Id.* at 134 (emphasis added). The Court of Appeals concluded that:

> [S]ince the statute is unambiguous on its face in this respect, and since this is not one of those "rare and exceptional circumstances [when there is] something to make plain the intent of Congress that the letter

> of the statute is not to prevail," . . . *the statute's literal meaning must be applied, and no condition of recording may be superimposed on the requirements explicitly specified in order for § 1110 to apply.*

Id. at 134 (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 n.33, 98 S.Ct. 2279, 2298 n.33, 57 L.Ed.2d 117 (1978), quoting *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 50, 75 L.Ed. 156 (1930)) (emphasis added).

This basic rule of statutory construction employed in *Air Vermont* and by the courts below has been established and consistently applied by this Court. *E.g., Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1575, 108 L.Ed.2d 842 (1990) (absent clearly expressed legislative intent to the contrary, the statutory language is conclusive); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989) (the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."); *Demarest v. Manspeaker*, __U.S.__, 111 S.Ct. 599, 604, 112 L.Ed.2d 608, 616 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. . . . In such cases we have followed their plain meaning.").

As this Court held recently in *West Virginia University Hospitals, Inc. v. Casey*, ___ U.S. ___, 111 S.Ct. 1138, 1147 (1991):

> As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. See *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by legislators or committees during the course of the enactment process. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'"), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

Here, too, section 1110 is clear and unambiguous and should be enforced "according to its terms."

2. The Terms "Lessor," "Leased" And "Lease" Must Be Given Their Plain And Ordinary Meaning, Separate From The Terms "Purchase Money Equipment Security Interest" And "Conditional Sale"

Debtors perceive the term "lease" as ambiguous because it is grouped with the terms "conditional vendor" and "purchase money security interest," both of which possess an acquisition element. Pet. 18. In an attempt to support their distorted perception, Debtors unavailingly rely on *noscitur a sociis*, a maxim of statutory construction whereby the meaning of one

term or phrase may be determined by reference to its association with the statute's other words and phrases. But "[t]he rule will not be applied where there is no ambiguity, or to thwart the legislative intent, or to make general words meaningless. The maxim is only an extrinsic aid and should only be used when the clear meaning of the words used in the statute is doubtful." 2A *Sutherland Statutory Construction*, § 47.16 at 161 (4th ed. 1984). This Court long ago determined that *noscitur a sociis* would only be applicable when ambiguity surrounds a term or phrase. This Court said:

> That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity.

Russell Motor Car Co. v. United States, 261 U.S. 514, 43 S.Ct. 428, 67 L.Ed. 778 (1923).

Debtors have consistently attempted to create ambiguity where none exists. As District Judge Mukasey found, "[o]n its face, the statute is unambiguous." Pet. 17a. Similarly, Bankruptcy Judge Blackshear in his opinion emphasized: "The statute clearly and unambiguously refers to "lease" and "lessor" without modifying or restricting those words; that is how this Court shall read section 1110." Pet. 48a. In accord, the District Court in *In re Continental Airlines, Inc.* concluded:

> In short, because the words "lease" and "lessor" in § 1110 are unrestricted and facially unambiguous, with a meaning fully ascertainable

> without reference to the related terms, the simple observation -- that the lease is, in one respect, not like the conditional sale and the PMESI -- is of no moment in ascertaining the plain meaning of these words. Nothing on the face of the statute suggests that each word in the grouping was not intended to have its clear ordinary meaning.

App. 14a.[9]

Furthermore, in *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961), this Court held that *noscitur a sociis* is best used where the ambiguous word is capable of many meanings; thus, looking at the surrounding terms best defines the correct usage. Here, however, the words "lease," "leased" and "lessor" have an ordinary and plain meaning. If Congress wanted to deviate from that meaning, it could have inserted terms such as "new" or "acquisition" to modify the words. It chose not to do so. As the District Court in *In re Continental Airlines, Inc.* found, conditional sale contracts, purchase money equipment security interests and leases are dissimilar (App. 14a) and attempts to find complete symmetry among such terms introduces complexities and ambiguities into the statute where they do not otherwise exist. Plainly, *noscitur a sociis* is not an appropriate rule of statutory construction to be applied in this case.

Debtors also make the anomalous argument that the requirement that a lease be a "true lease," somehow renders the term "lease" ambiguous.[10] Pet. 18. However, section 1110

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9. "App. ___" refers to the appendix annexed to this brief in opposition to the Petition.

10. Similarly, Debtors argue that a nonacquisition sale-leaseback transaction is substantively identical to a general mortgage. Pet. 14-15. However, the purchase of an aircraft is not a loan; and a lease of such

(continued...)

protection extends only to leases, not to transactions that take the form of leases that are disguised financings. Congress considered this point when enacting section 1110. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 240, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6199. The strict application of section 1110 to leases does not create ambiguity; on the contrary, it shows preciseness and clarity of intent by the drafters of the statute to exclude any transaction from its coverage that is a mortgage, not a "lease." The drafters recognized that "some leases are merely disguised security agreements," and are to be so treated. *Id.*

Accordingly, there is no reason for this Court to grant *certiorari* because section 1110 has been uniformly held to be clear and unambiguous.

B. The Second Circuit's Decision That Section 1110 Is Clear And Unambiguous On Its Face And Applies To All Lessors Is Not In Conflict With Any Other Circuit Court Decision

In determining whether to grant a petition for a writ of certiorari, this Court has often required that the decision subject to review be in direct conflict with a decision of another court of appeals. This Court has, on occasion, dismissed a writ of certiorari as improvidently granted where it has later been determined that the alleged conflict between decisions of the courts of appeals does not in fact exist. *See, e.g.,*

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10. (...continued)
aircraft back to a seller is not a mortgage. A lease differs in many important ways, both legal and economic, from a loan. For example, a lessor owns the property and, upon lease expiration, has the right to sell, release or use the equipment. In contrast, a lender generally enjoys no residual rights in the property financed and has no ability to participate in the aircraft's appreciation. As an owner, a lessor is also entitled to the tax benefits of ownership, such as depreciation deductions. 26 U.S.C. § 168.

Wisconsin Elec. Co. v. Dumore Co., 282 U.S. 813 (1931); *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). Moreover, Rule 10 of the Supreme Court Rules specifically provides that one reason for granting *certiorari* is "[w]hen a United States court of appeals has rendered a decision *in conflict* with the decision of another United States court of appeals on the same matter. . . . Sup. Ct. R. 10 (emphasis added).

Our research has not revealed any opinion by any other court of appeals which addresses the issue presented by the Petition, although, as indicated *supra*, the Court of Appeals for the Third Circuit has heard argument but not yet decided the issue. Indeed, Debtors do not cite a single circuit or district court decision which is at odds with the decision below. The granting of review by this Court at this time is, accordingly, unwarranted.

C. The Literal Meaning Of Section 1110 Is Consistent With The Congressional Purpose And Its Implementation

1. Background

As the lower courts correctly found, the legislative history from the enactment of section 77j of the former Bankruptcy Act through the enactment of the Bankruptcy Reform Act of 1978 reveals clearly an intent that section 1110 applies to all leases. Congress' intention to promote financing of the airline industry in the way it did was firmly rooted in the concept of "title." Sections 77j and 116(5) of the former Bankruptcy Act exempted lessors and conditional sales vendors from the restraints imposed by the automatic stay because *title* to the equipment remained in the lessors or conditional sales vendors. *See* H.R. Rep. No. 1283, 74th Cong., 1st Sess. 4, 6 (1935); S. Rep. No. 1032, 85th Cong., 1st Sess. 1 (1957); H.R. Rep. No. 944, 85th Cong., 1st Sess. 1, *reprinted in*

1957 U.S. Code Cong. & Admin. News 1926, 1927. Congress clearly recognized that where title is outside the debtor, it is "appropriate to exclude what is not property of the estate from the automatic stay in a reorganization case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 240, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6199.[11]

Moreover, by its terms, section 116(5) protected the "title of any owner" to aircraft equipment "leased, subleased or conditionally sold to any air carrier." "Title" is simply not, and has never been, a "purchase-money" or "acquisition" concept. A sale-leaseback transaction, for example, whenever it might be consummated, would unquestionably place "title" in the lessor.

The legislative history of the 1957 statute is quite short and simple. The relevant committees in both houses of Congress stated that the bill's purpose was to "permit the parties to a lease or conditional sale of specified aircraft equipment to render immune from the provisions of chapter X of the Bankruptcy Act the title and right to possession of such property." S. Rep. No. 1032, 85th Cong., 1st Sess. 2 (1957); H.R. Rep. No. 944, 85th Cong., 1st Sess. 2, *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926.

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11. Debtors' argument as to the historical relationship between after-acquired property clauses and leases is misplaced. Pet. 22. The advent of after-acquired property clauses created the problem of carving out an exception to the lien in after-acquired property for subsequent purchase money security interests, not for leases. Gerstell and Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 Am. Bankr. L.J. 1, 5 (1987). The exemption for leases in section 1110 and its predecessors had nothing to do with after-acquired property clauses. Instead, Congress' *rationale* for the exemption was that title to leased equipment remains in the lessor outside the estate and the automatic stay should not apply.

2. The Legislative History Of Section 1110 Is Fully Consistent With The Recognition Of Nonacquisition Sale-Leasebacks As Section 1110 Transactions

Sale-leaseback transactions are consistent with the legislative intent to encourage financing in the airline industry at lower costs. The Report of the House Bankruptcy Subcommittee states:

> Testimony before the Bankruptcy Subcommittee of this committee indicated that the smaller [air]lines are presently unable to attract the capital necessary for their current reequipment requirements. *Testimony also indicated that the enactment of this bill would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions.* The reason for this is the greater security afforded conditional sales vendors and lessors by the amendment to chapter X made in this bill.

H.R. Rep. No. 944, 85th Cong., 1st Sess. 1, *reprinted in* 1957 U.S. Code Cong. & Admin. News 1926, 1927 (emphasis added); *see also In re Airlift Intern., Inc.*, 761 F.2d 1503, 1507 (11th Cir. 1985) (the purpose of section 116(5) was "to enhance the borrowing ability of airlines"); 5 *Collier on Bankruptcy* ¶ 1110.01, at 110-3 (L. King 15th ed. 1990) (the predecessors to section 1110 "were designed to afford equipment financiers greater certainty than existed under the other provisions of the former Bankruptcy Act concerning such financiers").

It is clear that facilitating the financing of the aircraft industry was a prime Congressional purpose behind the amendment of section 116(5) of the Bankruptcy Act in 1957 and that it remained an important objective of that section's reenactment and expansion as section 1110 of the Bankruptcy

Code in 1978, H.R. Rep. No. 595, 95th Cong., 1st Sess. 239 (1977), *reprinted in* 1978 U.S. Code Cong. Admin. News. 5963, 6198-6199. While we do not challenge Debtors' contention that *one* of Congress' purposes in enacting section 1110 and its predecessors was to enable domestic certificated air carriers to acquire modern equipment, that certainly was not Congress' only purpose. Moreover, to adopt Debtors' position would only frustrate the purpose Debtors are urging upon this Court, since the requirement that equipment be "new" to Debtors does not, as Debtors concede, mandate that equipment itself be new or modern.

To arrive at the conclusion urged by Debtors, the broader explicit goals that Congress intended must be completely ignored. Such a myopic reading would raise more questions than it resolves. The District Court recognized that:

> In cases such as this where the legislative history appears to reflect many seemingly different but consistent goals, courts should be reluctant to rewrite the words of a statute unless the plain meaning of those words leads to a result clearly contrary to Congress' expressed intention.

Pet. 24a.

3. Nothing In The Legislative History Warrants Departure From The Plain Meaning Of Section 1110

Debtors are unable to cite any legislative history that states that the term "lease" for the purposes of section 1110 excludes sale-leaseback transactions which do not provide the acquisition of equipment "new" to an air carrier or *only* includes leases providing the acquisition of equipment "new" to the air carrier. In fact, the distinction between transactions that provide a new acquisition of equipment to the air carrier and those that do not was recognized by Congress when section 1110 was adopted. Carefully distinguishing between

acquisition and nonacquisition transactions, Congress added the concept of a "purchase money equipment security interest" to what became section 1110, thus limiting the class of *lenders* protected by section 1110, *but imposed no similar limitation on the class of lessors entitled to the protection of section 1110.* This is itself a persuasive indication of Congress' intent regarding the meaning of "lease" and "lessor" under section 1110. The legislative history reveals that:

> This section [1110], to a large degree, preserves the protection given lessors and conditional vendors of aircraft to a certified water carrier under section 116(5) and 116(6) of present Chapter X. It is modified to conform with the consolidation of Chapter X and XI and with the new chapter 11 generally. It is also modified to give the trustee in a reorganization case an opportunity to continue in possession of the equipment in question by curing defaults and by making the required lease or purchase payments. This removes the absolute veto power over a reorganization that lessors and conditional vendors have under present law, while entitling them to protection of their investment.

S. Rep. No. 989, 95th Cong., 2d Sess. 116-17, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5902, 5903.

If Congress wanted to restrict the operation of section 1110 to acquisition leases, it clearly would have done so through the express words of the statute. Congress knew how to distinguish among categories, and subcategories, of lessors and leases when it so desired. *See, e.g.*, section 502(a)(6) (limiting the damage claims only with respect to leases "a *lease of real property*") (emphasis added); section 365(h) (limiting consequences to lessee of rejection by trustee of "an unexpired *lease of real property* under which the debtor is the

lessor") (emphasis added); section 365(d)(3)-(4) (special rules for the timing of rejection of, and the performance of post-petition obligations under, "an *unexpired lease of non-residential real property*") (emphasis added); section 362(b)(10) (excepting from the automatic stay acts of a lessor under an *expired lease of non-residential real estate*). As indicated above, Congress knew how and, in fact, did provide an acquisition limitation in section 1110 on purchase money equipment security interest financing; by contrast, Congress left alone, notwithstanding repeated amendments to section 1110 and its predecessors, the all-encompassing and unqualified terms "lessor," "leased" and "lease."

If adopted, Debtors' view of section 1110 would eliminate the dominant type of financing needed by airlines in troubled financial circumstances (such as currently exist throughout the airline industry), *namely*, the use of a debtor's equity to obtain additional funds. B. Fritch, A. Reisman & I. Shrank, 1 *Equipment Leasing and Leveraged Leasing* 834 (3d ed. 1988). The preeminent legal authority in the equipment leasing field concludes:

> The better view from a policy standpoint, and certainly a less strained interpretation of the statute, is that §§ 1110 and 1168 [railroads] should apply to all equipment leases and conditional sales (including leveraged leases and sale-leasebacks) where there has been a change in ownership.

Id.

We respectfully submit that a review of the legislative history shows that Congress' purposes were multiple and that focusing on any single objective to the exclusion of others will imperil Congress' overriding policy, which was to enhance the airline industry's ability to raise capital at a cost the airlines could afford.

Given the absence of a clear and unequivocal indication that the inclusion of nonacquisition sale-leasebacks within the protection of section 1110 "will produce a result demonstrably at odds with the intention of [the] drafters", *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 242, or "would thwart the obvious purposes of the . . . statute," *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 910 (3d Cir. 1990) (quoting *Mansell v. Mansell*, 490 U.S. 581, 592 (1989), this Court should sustain the plain and unambiguous text of section 1110 and afford the aircraft lessors in sale-leasebacks their protection thereunder. *See, e.g., West Virginia University Hospitals, Inc. v. Casey*, 111 S.Ct. at 1147; *Demarest v. Manspeaker*, 111 S.Ct. at 604; *In re Chateaugay Corp.*, 920 F.2d at 184; *Air Vermont*, 761 F.2d at 134.

D. The Petition Does Not Present Any Issues Of Compelling Importance Warranting This Court's Review

As stated, the dispute herein is solely an issue of statutory construction. Although the plain meaning of this statute may not fit with Debtors' view of the legislative purpose, it can hardly be said that the issue presented by this appeal rises to the level of importance justifying review by this Court in the absence of other compelling reasons to grant *certiorari*.

III. THIS COURT DOES NOT NEED TO SETTLE THE QUESTION PRESENTED BECAUSE ALL AUTHORITY HOLDS THAT NONACQUISITION SALE-LEASEBACK TRANSACTIONS ARE ENTITLED TO THE PROTECTIONS OF SECTION 1110

The decisions below by Judges Lumbard, Winter and Walker of the Second Circuit, Judge Mukasey of the District Court and Judge Blackshear of the Bankruptcy Court are consistent with *all* judicial authority on this issue: *In re Continental Airlines, Inc.*, 91 Civ. 58 (RSG), slip op. (D. Del.

March 26, 1991), and *Braniff, Inc. v. Toren* (*In re Braniff, Inc.*), 110 Bankr. 980 (Bankr. M.D. Fla. 1990).

As Debtors do here, Continental and Braniff urged that the legislative history of section 1110 demonstrates that Congress intended the statute to apply only where a lessor leases aircraft *new* to an airline. Both courts unequivocally rejected that claim.

In *Braniff*, for example, the court began with an examination of the statute itself:

> *The language of Section 1110 is clear and unambiguous*; according to the statute, the benefits that Section 1110 provides are applicable when the enumerated, plainly stated elements are present and satisfied, as they obviously have been satisfied here.

Id. at 982-83 (emphasis added).

The court then rejected Braniff's claim that Congress proposed the legislation solely to encourage acquisition of equipment new to the airlines and, the plain language of the statute notwithstanding, intended to limit the scope of section 1110 to acquisition leases. The court especially criticized Braniff's analysis of section 1110's legislative history because, like Debtors' identical analysis here, it focused solely on the Congressional debate of a recent amendment expanding section 1110 to cover purchase money financing. The court stated:

> It is not surprising, therefore, that references to new acquisitions were featured prominently in the Congressional debates and reports constituting the legislative history of the 1978 expansion. But *focusing* on the 1978 legislative history that discusses the purposes for a particular *expansion* of the statute *without also examining the earlier base*

> *from which the expansion was being made distorts the conclusion.*

Id. at 983 (emphasis added).

This "earlier base" is quite revealing. The court continued:

> In the legislative history *before* the 1978 expansion into purchase money financing, there appears *no support* for the proposition that new acquisitions were intended to underlie, and be a necessary prerequisite for, the protection afforded to lessors by Section 1110's predecessors.

Id. (emphasis added).

The *Braniff* court quoted from House Report No. 944 to conclude that, in fact, no acquisition of any sort was required for section 1110 protection:

> Testimony *also* indicated that the enactment of this bill would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions.

Id. at 983-84 (emphasis added).

The court then pointed out the true purpose of the bill:

> *[T]he stated purpose of the bill* -- protecting lessors and conditional sellers -- *facilitates the reduction of capital costs to an airline regardless of whether the transaction contemplates the acquisition of new equipment* (by a new lease, for example) *or the refinancing of existing equipment* (by the renewal of an existing lease, for example).

Id. at 984 (emphasis added). Finally, after a review of the *entire* history, the court concluded:

> Certainly the history provides *no express legislative intent that is contrary to the plain language of the statute, which omits any "acquisition" element for leases, that would justify the Court's inclusion of this additional requirement.*

Id. at 984 (citations and footnote omitted) (emphasis added).

IV. THE APPELLATE COURT'S DECISION IS CORRECT

The courts below correctly declined Debtors' invitation to judicially rewrite section 1110. The Court of Appeals affirmed the District Court's order "for substantially the reasons stated by Judge Mukasey." Pet. 8a.

The District Court found the words "lessor," "leased" and "lease" in section 1110 to be unambiguous and unrestricted: such words "are not modified in any way which suggests that the statute was not meant to apply to lessors in a sale-leaseback transaction." Pet. 17a. After an extensive review, the District Court was satisfied that the legislative history failed to demonstrate the requisite clarity to justify a deviation from the statutory language. Judge Mukasey found that "the legislative history appears to reflect many seemingly different but *consistent* goals." Pet. 24a (emphasis added). The District Court also rejected Debtors' argument that an acquisition limitation should be read into leases because section 1110 contains an explicit acquisition limitation for security interests. This argument "contradicts both logic and rules of statutory construction. Congress placed explicit limitations on one group [security interests] . . . . That difference suggests the logical conclusion that Congress actually did *not* intend so to restrict the class of protected lessors." Pet. 22a (emphasis in original).

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be denied.

Dated: May 3, 1991.

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	:	
	:	Case Nos. 90-932
CONTINENTAL AIRLINES, INC.	:	through 90-984
et al.,	:	
	:	Civil Action No. 91-58
Debtors.	:	

OPINION

GAWTHROP, J.[1] March 26, 1991

This is a consolidated appeal[2] from a bench opinion issued by the Honorable Helen S. Balick, Judge of the United States Bankruptcy Court for the District of Delaware, on January 30, 1991, in which Judge Balick ruled that creditors leasing aircraft equipment by "sale-leaseback" transactions are not entitled to rights under § 1110 of the bankruptcy code. *See* 11 U.S.C. § 1110. Appellants are creditors who lease aircraft under sale-leaseback leases to appellees and debtors, Continental Airlines, Inc., et al.. Five other airlines--America West Airlines, Inc., American Airlines, Inc., Northwest Airlines, Inc., United Air Lines, Inc., and USAir, Inc.--as well as the American Association of Equipment Lessors--have filed as amicus curiae in support of the appellants' position.

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1. Robert S. Gawthrop, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

2. Sixty-one creditors took twelve separate appeals, (Nos. 91-58, 91-98 through 91-104, 91-107 through 91-110, and 91-113). These appeals, which all raise the same legal question, were consolidated by the court, upon stipulation of counsel.

Appellants and amici urge this court to reverse the bankruptc court and hold that leases resulting from sale-leaseba transactions are entitled to § 1110 protection. For th following reasons, I shall so hold.

BACKGROUND

Continental Airlines, like other major airlines in the Unite States, holds a significant number of its aircraft by lease, an does so, in large part, by so-called "sale-leaseback" transactions. Airplane leases are generally of two types: (1 acquisition leases, under which an airline acquires aircraft fo its fleet, and (2) non-acquisition leases, under which an airlin sells aircraft from its existing fleet, and then leases the sam aircraft back from the purchaser. These latter, widely used sale-leaseback transactions, allow an airline to obtain operatin capital, in exchange for a promise to pay a rental annuity The annuity, combined with the residual value of the aircra so leased, is calculated to bring the lessor a profit over th purchase price.

On December 3, 1990, Continental filed a voluntar petition in bankruptcy under Chapter 11. On January 16 1991, Continental filed a motion before the bankruptcy cour asking the court to find that the leases that debtors hold unde sale-leaseback transactions are not subject to § 1110 of th bankruptcy code.

Section 1110, in effect, exempts persons, who hav specified interests in aircraft or aircraft equipment from th automatic stay of the bankruptcy code, which stay orde attaches to a debtor's property upon the filing of a bankruptc petition. *See* 11 U.S.C. § 362(a). The stay ordinaril prevents creditors from moving against any property of th debtor to recover on any debts owed, until granted permissio to do so by the bankruptcy court. *Id.* Parties within th

protection of § 1110, however, may repossess aircraft and aircraft equipment in which they have an interest, despite the automatic stay, if the debtor does not agree to pay all obligations and cure all defaults within 60 days. By its terms, § 1110 protects "lessors", "conditional vendors", and parties with "purchase money equipment security interest[s]" (PMESIs).[3]

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3. Section 1110 provides in relevant part:

> Aircraft equipment and vessels
>
> (a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts . . . that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier . . ., to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless--
>
> > (1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and
> >
> > (2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be--
> >
> > > (A) that occurred before such date is cured before the expiration of such 60-day period; and

(continued...)

Continental sought authority from the bankruptcy court to cure defaults and meet obligations on various transactions that Continental determined to fall within § 1110. Payments due on these transactions total approximately $108 million. Continental did not seek similar authority to cure payments due under non-acquisition leases. Asserting that non-acquisition leases are not within § 1110, Continental seeks the continued use of aircraft so leased without having to pay the amounts now due on these leases, which totals approximately $58 million.

On January 30, 1990, after hearing oral argument from both parties, the bankruptcy court ruled that, unless non-acquisition leases are part of an acquisition package, they are not "leases" within the meaning of § 1110: i.e. only if an airline arranges to buy an aircraft, with the design of immediately selling it to, and leasing it back from, a financier, is the non-acquisition lease a "lease" within § 1110. *See* Tr. at 116 (Nos. 90-932 through 980, January 30, 1990). In reaching this conclusion, the bankruptcy court observed that the other transactions covered by § 1110--the PMESI and the conditional-sale contract--involve acquisitions. The court concluded that there was no basis for construing "lease" more broadly than these related terms. *See id.*, at 115-116.

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3. (...continued)

(B) that occurs after such date is cured before the later of--

(i) 30 days after the date of such default; and

(ii) the expiration of such 60-day period.

DISCUSSION

I. Jurisdiction over Appeal

Parties adversely affected by "final judgments, orders and decrees" of bankruptcy courts, may appeal, as of right, to the district court in the relevant jurisdiction. 28 U.S.C. § 158(a). Parties adversely affected by interlocutory orders may appeal by leave of court. *Id.* Continental argues that Judge Balick's order was not final, and that leave to appeal is inappropriate in this case. I do not address whether leave is appropriate, as I find that the order was final.

Since bankruptcy proceedings involve many parties and are frequently protracted, a strict finality requirement in the bankruptcy context, allowing appeal by right only after a reorganization plan is confirmed, could cause substantial waste of time and resources in particular cases. *See In re Amatex Corp.*, 755 F.2d 1034, 1039 (3rd Cir. 1985). Thus, the Third Circuit has declared that courts faced with bankruptcy appeals should take a pragmatic approach to the finality requirement, and treat as final, orders that in other contexts might be considered interlocutory. *Walsh Trucking v. Insurance Co. of North America*, 838 F.2d 698, 701 (3rd Cir. 1988).

The factors to be considered in determining whether the order of a bankruptcy court is final include: the impact of the issue on the assets of the bankruptcy estate, the necessity for additional fact-finding on remand, the preclusive effect of a decision on the merits of subsequent litigation, and the furtherance of judicial economy. *See Wheeling-Pittsburgh Steel Corp. v. McCune*, 836 F.2d 153, 158 (3rd Cir. 1987) (citing *In re Mevertech*, 831 F.2d 410, 414 (3rd Cir. 1987). The § 1110 issue pressed here is one of law, requires no factfinding, affects the distribution of $58 million from the

bankruptcy estate, and, when decided, will have preclusive effect on actions by future parties to sale-leaseback transactions.

Continental argues that the bankruptcy court's order, finding § 1110 not to apply to sale-leaseback transactions, is not final, because it merely postpones, rather than forecloses, the creditors' rights in their collateral. *See First American Bank of New York v. Century glove, Inc.*, 64 B.R. 958, 959 (D.Del. 1986). This is a mischaracterization. Section 1110 grants certain creditors the right to be free from the automatic stay of the bankruptcy code. The bankruptcy court's order in this case deprives appellants of these rights forever. Although the lessors retain rights in their property, these rights are fundamentally altered when subjected to the operation of the bankruptcy code. This is the essence of a final decision. This court has jurisdiction thereby.

II. Sale-Leaseback Transactions and § 1110

The substantive issue before the court is solely one of statutory construction: whether the terms "lessor" and "lease" in § 1110 cover lessors who purchase from an airline the very aircraft or aircraft equipment that they lease back to the airline. Before addressing this question, it is important to note a related issue not being decided.

Under the Uniform Commercial Code, financing transactions denominated as leases, but designed to create security interests, are not treated as bona fide leases, but rather are treated as security agreements for sale. *See In re Aspen Impressions, Inc.*, 94 B.R. 861, 864 (Bankr.E.D.Pa. 1984) (citing § 1-207(37) of the U.C.C.). Continental has argued that many, if not all, of the sale-leaseback leases in question on this appeal are not bona fide leases but are properly characterized as security agreements for sale, and

thus not entitled to protection under § 1110 as leases.[4] Further, Continental suggests that since these sale-leaseback transactions create security interests that are not "purchase-money equipment security interests", as that term is used in § 1110,[5] they are not subject to the protection of § 1110 at all.

However, this characterization issue, which Continental has vowed to press with respect to each of its non-acquisition leases, should it lose this appeal, is not now before me.[6] Here, I assume that the non-acquisition leases in question are bona fide leases, and thus address the legal question whether such leases are nevertheless outside the protection of § 1110, because they did not bring new airplanes to Continental's fleet.

Two courts have already written on this question, both finding that non-acquisition leases are covered by § 1110. *See In re Pan Am Corporation*, No. 91-1659, slip op. (S.D.N.Y. March 18, 1991); *In re Braniff, Inc.*, 110 B.R. 980, 985 (Bankr.M.D.Fla. 1990). These opinions are instructive. However, due to the importance of the question,

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4. Continental urges, in effect, that the word "lease" within § 1110 be read to include only "bona fide leases." Although the court is aware of no cases so holding with respect to § 1110, there is case law holding that the word "lease" in other sections of the bankruptcy code includes only bona fide leases. *See In re PCH Associates*, 804 F.2d 193 (2nd Cir. 1986) (addressing 11 U.S.C. §§ 365(d) and 502(b)(6)).

5. "Purchase money equipment security interest" is not defined in § 1110. The legislative history behind the section links this phrase to the concept as developed by the U.C.C. in § 9-107. *See* H.R.Rep.No. 595, 95th Cong., ast Sess. 240, *reprinted in* 1978 U.S.Code & Adm.News at 6199. *See also* footnote 10.

6. Nor does the *in terrorem* intimation of Continental, regarding the incremental judicial labor that such a holding could engender, have any impact on the task of fairly and accurately construing the statute.

and the difference of opinion from the court below, I will take a fresh look.

Continental asserts that the word "lease" in § 1110, when read in the context of surrounding words in the section, and in the light of the purposes of the bankruptcy code as a whole, can only be taken to include those "leases" that are designed to augment a carrier's fleet and equipment supply. Continental contends that this result is dictated by the principle of statutory construction known as *noscitur a sociis*, and by the legislative history behind § 1110. I shall address each in turn.

A. *Noscitur A Sociis*

Noscitur a sociis means, literally, that a thing may be known by its associates. In the context of statutory construction, it is invoked for the proposition that the meaning of a word may be derived from the meaning of accompanying words. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *see also Black's Law Dictionary* at 956 (5th Ed., 1979). This principle has been applied by the Supreme Court, *Jarecki*, 367 U.S. at 307, and recently by the Third Circuit. *Balley v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682 (3rd Cir. 1991). Elsewhere the Supreme Court has expounded the similar principle that "words grouped in a list should be given related meaning". *See Massachusetts v. Morash*, 490 U.S. 107, 114-5 (1988); *see also Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 322 and n. 16 (1977) (equating *noscitur a sociis* with principle that grouped words are to be given related meaning).

Continental urges the court to apply *noscitur a sociis* to § 1110, and rule that "lease" means acquisition lease, because the other words in the list: "conditional sales" and "purchase money equipment security agreements" necessarily

involve acquisitions. I find to the contrary that *noscitur a sociis* is no aid in this context.

Maxims of statutory construction are aids in ascertaining the plain meaning of a statute, not tools to contradict plain meaning. Simply because Congress places a word in a statutory list, does not mean that the word is intended to be treated like its fellows in all respects. Indeed, the Supreme Court has recognized that when words are grouped by the disjunctive "or", they are ordinarily to be given separate meaning. *See Garcia v. United States*, 469 U.S. 70, 73 (1984). Because a word in a list "may have a character of its own not to be submerged by its association," *noscitur a sociis* should be applied, as a general rule, only where the meaning of the word is "obscure" or "doubtful". *Russel Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). *See also Jarecki*, 367 U.S. at 307 *and Balley*, 925 F.2d at 682 (*noscitur a sociis* is "wisely applied where a word is capable of many meanings").

The word "lease", as used in § 1110, suffers from no apparent ambiguity. Although a "lease" may arise in many contexts, the word is generally limited to specific transactions in property, under which an owner/lessor conveys property to a lessee for a term of years, in exchange for the lessee's promise to pay a fixed rent. *See generally Webster's Third New International Dictionary* at 1286 (1986). Sale-leaseback leases are leases within this definition. The fact that an airline sells a lessor an aircraft, before entering an agreement to lease the same aircraft back from the lessor, does not mean that the agreement is not a "lease", as the term is commonly understood. *See e.g. Frank Lyon Co. v. United States*, 435 U.S. 561, 581 (1978) (taxpayer leasing building under sale-leaseback transaction is treated as owner/lessor under a standard lease transaction and is entitled to tax benefits from depreciation).

Continental points to no ambiguity inherent to the term "lease" as used in § 1110. Rather, Continental suggests that the meaning of lease must be restricted to avoid a clash with the meaning of the other two terms in the list. However, the fact that lease transactions need not involve new acquisitions, while conditional sales or PMESIs necessarily involve acquisitions, does not mean that the three terms were not intended to have their full and ordinary meaning. Indeed, absent clear indication to the contrary, the plain meaning of the terms controls. *See Demarest v. Manspeaker*, 498 U.S. ____, 111 S.Ct. 599, 112 L.Ed.2d 608, 616 (1991).

Continental relies on a number of cases where the Supreme Court applied *noscitur a sociis*, explicitly or implicitly, to restrict the meaning of a statutory term. *See Morash*, 490 U.S. at 107; *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985); *Third National Bank*, 432 U.S. at 312; *Jarecki*, 367 U.S. at 303. These cases are fact-specific, demonstrating circumstances where the principle of *noscitur a sociis* can be helpful to elucidate a statute's meaning, but adhering to no particular rule of thumb for its application. Having considered these cases separately and in some length, I find none to be apposite to the case at bar.

Morash and *Jarecki* illustrate the classic circumstance for the application of *noscitur a sociis*: in each, the language in question contained an ambiguity, or constructural conundrums, that could not be solved without reference to related words. In *Morash*, 490 U.S. at 107, the Court was called upon to decide whether policies of employers to pay employees for accrued but unused vacation days are "vacation benefit plans" within the meaning of § 3(3) of the Employee Retirement Income Security Act, (ERISA), *see* 29 U.S.C. § 1023(3). Section 3(3) provides that "any plan, fund, or program" maintained to provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident,

disability, death or unemployment, or *vacation benefits*, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services" are welfare benefit plans subject to ERISA's regulatory scope. *See* 11 U.S.C. § 1023(3) (emphasis added). Despite the specific inclusion of "vacation benefits" within the section, the Supreme Court held that vacation accrual plans "payable on a regular basis from the general assets of the employer" are not benefit plans subject to ERISA's requirements.

Looking to the characteristics of the other "listed" benefits, the Court determined that Congress intended to regulate only those plans which give an employee rights that are contingent on future occurrences, or which subject an employee to risks different from the normal employment risk. 490 U.S. at 116. In so doing, the Court tacitly acknowledged that the term "vacation benefit plan", within the definition section of ERISA, could not be interpreted without reference to the other terms in that section. This is in marked contrast to the term "lease" as it appears in § 1110. "Vacation benefit plan" is a statutory construct, created by Congress to refer to a certain class of employee benefit plans. "Lease", on the other hand, is a word not invented by the bankruptcy code, and not dependent on the other provisions of the code for its meaning. Rather, it has a long history in the English language and in the common law.

The Court's opinion in *Jarecki*, 367 U.S. at 303, is similar. There, the Court was asked to address a section of the Excess Profits Tax Act of 1950, which excluded from the excise tax, "income resulting from exploration, discovery, or prospecting". *See* 367 U.S. at 305. A group of taxpayers asserted that the word "discovery" included the "discovery" or invention of new products. The Court disagreed, finding the term to be limited to income generated in the oil and gas and mining industries. 367 U.S. at 307. In doing so the court

specifically recognized that "discovery" is a word capable of many meanings that could only be interpreted with reference to the surrounding terms "exploration" and "prospecting". *Id.*

The two other Supreme Court cases cited by Continental are distinguishable for other reasons. In *Schreiber v. Burlington Northern, Inc.*, 472 U.S. at 1, the Court considered whether the prohibition against "manipulative" practices in tender offers, contained in § 14(e) of the Williams Act, covers practices that artificially affect the price of stock, but which are fully disclosed. Section 14(e) prevents persons from engaging in "fraudulent, deceptive, or manipulative acts". Noting that "fraudulent" and "deceptive" acts both involve some element of misrepresentation, the Court read "manipulative" acts to require misrepresentation as well. *See* 472 U.S. at 8. At the same time, the court noted that this definition of "manipulative" was in accord with the word as used as a term of art in common law, and as defined in the dictionary. *See* 472 U.S. at 7. In short, although the Court referred to *noscitur a sociis* to strengthen its holding, it did so not to vary the plain meaning of the term, but to confirm it.

In *Third National Bank*, 432 U.S. at 312, the Court ruled that courts may preliminarily enjoin federal banks from foreclosing on mortgages, despite the language of 12 U.S.C. § 91, which states that no "attachment, injunction, or execution" may issue against a bank of the United States. The Court's holding limits the application of the statute to injunctions that would have the effect of seizing a bank's property, and is based, in part, on the Court's recognition that the writs of "attachment" and "execution", which "sandwich" the word "injunction" in the statute, are writs used by creditors to seize bank property, while the writ of garnishment, used by banks to move against the property of others, was "conspicuously absent" from the statute's terms. 432 U.S. at 322-23.

At first blush, the Court appears to be using *noscitur a sociis* to vary the meaning of a word--"injunction"--which is otherwise without ambiguity. However, this was an extraordinary case. Historical evidence before the Court suggested a reason for preventing creditors from obtaining injunctions against and seizing property from national banks, before a judgment is entered: viz. the threat of insolvency and the need to preventing creditors from gaining preferences. Yet the Court could find no "national or local" interest to be served in forbidding injunctions against national banks, preventing the banks themselves from moving against noncreditors. 432 U.S. at 323. Indeed, the Court found that if courts were not allowed to preliminarily enjoin aggressive actions by national banks, the only result would be to give these banks a "license to inflict irreparable injury against others." In short, the Court invoked *noscitur a sociis* to avoid an irrational reading of the statute.

Continental argues that a restrictive reading of § 1110--i.e. one that excludes non-acquisition leases--would further the public policy in favor or reorganization, which is embodied within the bankruptcy code. Nevertheless, Continental does not and cannot suggest that an expansive reading of § 1110 to cover non-acquisition leases is irrational. The policy question here concerns the trade-off of pre-bankruptcy benefits for post-bankruptcy burdens. If sale-leasebacks are afforded § 1110 protection, solvent airlines are benefitted with a means to obtain inexpensive financing, enabling them to upgrade operations and stave off insolvency during a credit crunch. At the same time, if the airline goes into bankruptcy, it will be faced with the obligation of having to make payments on the sale-leaseback leases if it wishes to keep operating the aircraft held under these leases. The national economic implications of this dynamic, while subject to debate, are not so clearly undesirable to require that § 1110 be read contrary to its literal terms.

In short, because the words "lease" and "lessor" in § 1110 are unrestricted and facially unambiguous, with a meaning fully ascertainable without reference to the related terms, the simple observation--that the lease is, in one respect, not like the conditional sale and the PMESI--is of no moment in ascertaining the plain meaning of these words. Nothing on the face of the statute suggests that each word in the grouping was not intended to have its clear ordinary meaning. Thus I turn to Continental's argument with respect to legislative history.

B. Legislative History

1. Relevance to Interpretation of § 1110

Review of legislative history is appropriate in interpreting a statute, even when the statutory language is professed to be plain on its face. *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 910 (3rd Cir. 1990); *Paskel v. Heckler*, 768 F.2d 540, 543 (3rd Cir. 1985). This is not to say that plain language can be ignored. To the contrary, the words the legislature chooses are the most persuasive evidence of a statute's purpose and must be treated accordingly. *See Smith*, 898 F.2d at 910 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *United States v. American Trucking Ass'n. Inc.*, 310 U.S. 534, 543 (1940)). When the words are "clear and plain" a court must follow them, unless a literal reading produces results that are "demonstrably at odds with the intention of the drafters". *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989); *Smith*, 898 F.2d at 910.

The party who would vary the literal reading of a statute faces the heavy burden of demonstrating that the literal

reading is demonstrably at odds with the legislative intent. *See Paskel*, 768 F.2d at 543. This burden is high because the statutory language, as the embodiment of the law, contains a significance not present in the words of legislative reports. Not only does Congress place more thought on the future implications of the actual language of a statute, *see Paskel*, 768 F.2d at 544, but that language is the guide by which citizens are expected to order their affairs.

Continental contends that this stringent standard does not apply here, because it is not attempting to vary the meaning of § 1110. Continental states that the meaning of the statute, properly understood, is that meaning suggested by application of the doctrine *noscitur a sociis*. While I have rejected the view that *noscitur a sociis* alone can be applied to vary the statute's literal meaning, I acknowledge that this principle may provide some support for Continental's claim if consistent with the legislative history. Nevertheless, this does not mean that Continental can create an ambiguity with *noscitur a sociis* when none otherwise exists. The heavy burden attaches whenever a party would vary the literal reading of the statute. *Paskel*, 768 F.2d at 544. That a party can point to a maxim of statutory construction, to support a meaning other than the literal reading, is irrelevant.

Thus while I look to the legislative history, I bear in mind the limited purpose of the search. The question here is whether a literal reading of the statute to include non-acquisition leases produces a result "demonstrably at odds" with the legislators' intent, as manifest in the legislative history. *Ron Pair*, 489 U.S. at 24; *Smith*, 898 F.2d at 910.

2. Historical Development
a. Section 77(j)

Section 1110 of the current bankruptcy code has its origin in like provisions of previous codes. The first such provision, § 77(j), appeared in 1935, for the benefit of equipment financiers in the railroad industry. *See* Act of August 27, 1935, Pub.L.No. 74-381, ch. 774, 49 Stat. 911 (codified at 11 U.S.C. § 205(j), repealed). Amending the then existing law regarding the reorganization of railroads, Congress added a clause that exempts lessors and conditional vendors of rolling stock equipment from the court's power in bankruptcy to enjoin repossession of such equipment. *See id.*.[7]

The purpose of this exemption, as articulated in the House Report accompanying the legislation, was to preserve the rights of trustees under "typical equipment trust agreement[s]", *see* H.R.Rep.No. 1283, 74th Cong., 1st Sess. at 4 (1935). Equipment trusts were financing devices used by the railroad industry in which trustees purchased equipment from a manufacturer, and then leased equipment to railroad companies. *See Black's Law Dictionary* at 482 (5th ed. 1979). The advantage of the equipment trust for financiers

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7. Section 77(j) provides in relevant part, that:

> . . . the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance or any judicial proceeding to enforce any lien upon the estate until after final decree: Provided, . . . [that] [t]he title of any owner, whether as trustee or otherwise, in rolling stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of an such lease or conditional sale contract, shall not be affected by the provisions of this section.

was that it gave the financier/trustee priority over claims to the equipment by holders of mortgages containing after-acquired equipment clauses.[8] However, before the passage of § 77(j), it was unclear whether the trustees' title in railroad equipment was also free from the powers of the bankruptcy court. There was case law at the time suggesting that the trust agreement should be treated, in reorganization proceedings, like a general mortgage. *See* H.R.Rep.No. 1283, 74th Cong., 1st Sess. at 4.

In deciding to resolve the doubt in favor of an exemption for equipment financiers, and in favor of the validity of the equipment trust "as a means of financing equipment purchases," the drafters of the house report noted the need to make equipment financing readily available

> . . . at a time when the development of the transportation art is providing new forms of equipment, particularly in the passenger field, of which, in interests of efficiency and economy, the carriers should be able to avail themselves, and because, after a depression the carriers are usually required to make large expenditures for equipment in order to accommodate the improved traffic . . .

See id., at 4. The design of § 77(j) was thus to preserve for financiers and railroads, the benefits of an established form of financing equipment purchases. By preserving the financiers' rights to repossess equipment, § 77(j) provided low-cost financing for railroad equipment purchases.

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8. The theory behind the trustee's priority is not entirely clear. Under both leases and conditional sales the lender retains title to the equipment. Since the equipment thus does not become property of the railroad, it is isolated from general mortgages thereon. However, it also appears that equipment financiers could obtain priority over general mortgages simply by virtue of having a purchase-money claim. *See generally* 2 Gilmore, *Security Interests in Personal Property*, § 28.2 at 748.

b. Section 116(5)

In 1957, Congress added a similar clause to the bankruptcy code to encourage equipment financing in the airline industry. *See* Act of September 4, 1957, Pub.L.No. 85-295, ch. 681, 71 Stat. 617, *reprinted in* 1957 U.S.Code Cong. & Admin.News 681 (codified at 11 U.S.C. § 516(5), repealed). Section 116(5) rendered the then-existing provisions of Chapter X, and the court's power to issue injunctions thereunder, inapplicable to property claims of lessors and conditional vendors of certain aircraft equipment.[9]

The house report accompanying this amendment likened § 116(5) to § 77(j), and "contemplated" that the enactment of § 116(5) would "result in extensive use of equipment trust financing as the financial basis for a major reequipment program [in the airline industry]." *See* H.R.Rep.No. 944, 85th Cong., 1st Sess. at 2 (1957), *reprinted in* 1957 U.S.Code Cong. & Admin.News 1926, 1927. The report also noted testimony before the house judiciary committee, which established that "smaller [air]lines" were having trouble attracting capital for reequipment requirements, and that enactment of § 116(5) would increase the availability of capital at lower rates of interest, due to the "greater security" thereby provided to lessors and conditional vendors. The

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9. Section 116(5) provided, with citations omitted, that:

> Notwithstanding any other provisions of chapter X, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances and spare parts . . . leased, sub-leased or conditionally sold to any air carrier . . . and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of chapter X if the terms of such lease or conditional sale so provide.

report thus suggested that in enacting § 116(5), Congress was concerned with encouraging a financial climate in the airline industry that would allow carriers to obtain financing to acquire new aircraft and equipment.

In 1968, Congress enacted a similar provision, § 116(6), to aid financing in the shipping industry. *See* Act of October 17, 1968, Pub.L.No. 90-586, 82 Stat. 1149, *reprinted in* 1968 U.S.Code Cong. & Admin.News 1322 (codified at 11 U.S.C. § 516(6), repealed). The house report accompanying this legislation noted that both the railroads and airlines already had "equipment trust" financing, which were exempt from the operations of the bankruptcy code. H.R.Rep.No. 1932, 90th Cong., 2nd Sess. (1968), *reprinted in* 1968 U.S.Code Cong. & Adm.News 4279.

c. Section 1110

In 1978, when Congress passed an entirely new bankruptcy code, the protection afforded lessors and conditional vendors in §§ 77(j), 116(5) and 116(6) of the old code, were in large part retained. *See* 11 U.S.C. § 1168 (railroads) and 11 U.S.C. § 1110 (shipping and airlines). Two important changes, however, were made. Under §§ 1168 and 1110, parties holding PMESIs are added to the protected class, and all parties with protected interests are required to wait 60 days, in which the airline can move to cure defaults, before moving to repossess.

In addressing the new transportation equipment exceptions, the drafters of the 1978 house report first summarized the old, stating that the railroad exemption was originally enacted to "protect a form of financing that had obtained in the rail industry for several decades before the enactment of the first railroad reorganization provision", while the airplane and ship exemptions were enacted to "encourage[] new financing in the

relevant industries." *See* H.R.Rep.No. 595, 95th Cong., 1st Sess. at 239 (1977), *reprinted in* 1978 U.S.Code Cong. & Admin.News at 1698. The drafters also explained that the old provisions exempted only "leases and conditional sales" on the theory that under these transactions "title of the property does not pass to the debtor, but remains in the financier". Where property is not part of the debtor's estate, the report states, "it is appropriate to exclude [it] from the automatic stay in a reorganization case". *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199.

The report suggests that Congress retained the old provisions, not so much to reaffirm their initial purposes, as to preserve a system of financing to which the industry had grown accustomed. "Whether or not there was an initial need for these provisions," the report states, "their existence has become largely addicting to the financing industry, and now the industry claims it would simply cease financing of the relevant equipment if the protections were removed." *Id.* at 239, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6198.

While thus acceding to the industry's desire that the exemptions remain, Congress did see a need to soften their impact and modernize their effect. Noting that the absolute exemptions were "harsh in . . . application", the drafters of the house report explained that the 60-day grace period was to take the edge off the old provisions, and "accommodate the joint interests of the equipment financiers and . . . the reorganization process". *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199. The drafters further explained that the PMESI was included within the exemption to avoid having financing transactions "unnecessarily force[d] . . . into outmoded forms," and to accommodate new forms of equipment financing "more consonant with modern law". *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at

6199. The report, however, is careful to state that the addition of "equipment security interest[s]" included "only security interests that were granted to finance the acquisition of the covered equipment" and excluded "general mortgage[s]". *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199.[10]

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10. Because the parties disagree as to the precise meaning of this portion of the legislative history, I reproduce it at length:

> An attempt was made to preserve the limitations on the right of the financier contained in current law. However, certain changes were made. First, the proposed sections provide protection for equipment security interests. The term includes only security interests that were granted to finance the acquisition of the covered equipment. A general mortgage is excluded. Under present law, the protection applies only to leases and conditional sales of equipment. The theory behind the present limitation is that under leases and conditional sales, title of the property does not pass to the debtor, but remains in the financier. Thus, it is appropriate to exclude what is not property of the estate from the automatic stay in the reorganization case.
>
> Changes in financing practices and in the bankruptcy laws have suggested that the former limitation be deleted, and that the protection be expanded to cover equipment security interests. Since the adoption of the original sections, there has been universal adoption of Article 9 of the Uniform Commercial Code, which abolishes conditional sales contracts, and substitutes security agreements and security interests instead. changes in the bankruptcy laws provide similar restraints for lessors of property to the debtor as exist for mortgages of secured creditors. Indeed, the Uniform commercial code acknowledges that some leases are merely disguised security agreements, and directs that they be so treated. Because retention of the prior limitation would unnecessarily force equipment financing into outmoded forms, protection of security interests was added to make financing forms more flexible and more consonant with modern law.

3. Interpretation

In summary, the legislative history behind § 1110 reveals the following: The notion of an equipment financing exemption was first adopted into law in the railroad industry, in § 77(j), to preserve for financiers the benefits of what was known as "equipment-trust financing", because the availability of such financing would provide inexpensive capital to railroads, allowing them to reequip and begin to pull out of the Great Depression. H.R.Rep.No. 1283 at 4. Congress later extended the exemption to the airline industry, in § 116(5), to bring equipment trust financing to air carriers, and particularly to aid "smaller" carriers in obtaining capital to reequip their fleets. H.R.Rep.No. 944 at 2, *reprinted in* 1957 U.S.Code Cong. & Admin.News at 1926. Congress made these exemption applicable to leases and conditional sales, on the theory that when title remains with the creditor, as when equipment is leased or sold conditionally, the property is not properly part of the debtor's estate when reorganization is attempted. H.R.Rep.No. 595 at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199.

Congress continued the protection provided by § 116(5) when enacting § 1110. Congress did so in apparent acquiescence to the financing industry's "addiction" to equipment trust financing. *Id.* at 239, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6198. Congress added PMESIs to the list of protected transactions, despite the fact that the holders of such interests do not hold title to the secured property, because conditional sales, under modern commercial law, have been discredited in favor of the PMESI. *Id.* at 240, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199. In adding security interests to the protected category, Congress was careful to include only purchase money interests, and not general mortgages.

To interpret the legislative history of § 1110, Continental focuses on the fact that leases and conditional sales, and equipment-trust financing in general, were the means by which carriers traditionally acquired new equipment. Continental further notes Congress's design to include, within the protection of § 1110, the modern form of acquisition financing--transactions creating purchase money security interests--while excluding general mortgage financing, aimed at raising operating capital. From this Continental gleans a Congressional intent to include only acquisition financing in the exemption, and to exclude lease transactions that do not bring new equipment to an airline, but which are used instead to bring in operating capital.

I agree that the legislative history demonstrates that Congress was concerned with facilitating acquisition financing. However, I am unable to also find that Congress was concerned only with facilitating acquisition financing, and intended § 1110 to be so limited. The legislative reports from § 1110 and its predecessors contain various remarks regarding the encouragement of financing in general. The legislative reports also show that Congress favored inexpensive financing, at least in part, because it would promote acquisition of new equipment and modernization within the transportation industries. However, Continental has pointed to no statements, in any of the predecessor statutes or the accompanying legislative reports, that manifest a Congressional desire to limit the exemption for lease financing to the goal of promoting acquisitions.

Continental contends that this function is performed by the phrase from the 1978 report, in which the drafters assert that: "A general mortgage is excluded". *Id.*, *reprinted in* 1978 U.S.Code Cong. & Admin.News at 6199. However, this comment was made in the discussion of the addition of security interests to the airplane equipment exemption, and

was apparently used to distinguish common security interests from purchase money security interests.[11] Further, even if this comment is read more broadly, it does not mean that non-acquisition leases must be excluded from the protection of § 1110. Continental argues for such a result by analogizing non-acquisition leases to general mortgage financing. Yet a mortgage is not a lease. It is one thing to say that mortgages are excluded, and quite another to say that all transactions behaving like mortgages are excluded. There is nothing in the legislative history asserting the latter. Indeed, the house report to § 1110 notes that the exemptions are based on a title theory, which applies whether or not the lease is an acquisition lease.

Further, the inclusion of non-acquisition leases within the exemption can be seen to be consonant with the legislative goal of encouraging acquisitions. While non-acquisition leases do not directly result in new aircraft or equipment for a carrier, the conversion of ownership interests in existing aircraft to leasehold interests, frees up capital that an airline can use to facilitate the acquisition of such aircraft. *See Pan Am*, No. 91-1659, Slip Op. at 8.

In so noting, I recognize that the equipment financing exemption in § 1110 is at cross purposes with the automatic stay in § 362(a). As § 1110 is read more broadly, the size of the debtors' estate protected for reorganization by § 362(a) is narrowed. Since parts or sections of statutes are not to be read in isolation, but in view of the statute as a whole, *see United States v. Morton*, 467 U.S. 822, 828 (1984), it is axiomatic that statutory exemptions should not be read to emasculate the provisions that they vary. On the other hand, the inclusion of non-acquisition leases within § 1110 diminishes the protections of the automatic stay, not generally,

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11. *See* footnote 10.

but only in the airline and shipping industries. Congress certainly knew that the inclusion of equipment leases within § 1110 would limit the resources available for airlines during reorganization. That Congress nevertheless failed to restrict the type of leases exempted, and failed to suggest a need for such restriction in legislative reports, is evidence that Congress meant what it said.[12]

The legislative history demonstrates that Congress had a goal of encouraging equipment financing in the airline industry. Under the terms of § 1110, Congress chose to exempt equipment leases, without exception, from the automatic stay, as a means to achieve this goal. Continental argues that the goal would be better served if only acquisition leases were exempted. Yet it can also be argued that Congressional purposes would be better achieved if the exemption were limited to acquisition leases on new equipment, excluding leases acquiring older aircraft, because Congress was concerned with modernization. Likewise, it can be argued that the exemption should be limited to persons leasing to "smaller carriers", because Congress only

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12. Congress's knowledge of the use of sale-leaseback transactions in the transportation industries is not certain. Sale-leaseback transactions, however, are not new to the financing industry. *See e.g. Yorkshire Ry. Wagon Co. v. Maclure*, 21 Ch.D. 309, 51 L.J.Ch. 857, 47 L.T. 290, 10 Digest (Rept.) 756 (1882) (addressing sale leaseback of "locomotives and wagons"); *Brodsky v. Perth Amboy National Bank*, 259 F.2d 705 (3rd Cir. 1958) (addressing sale leaseback on real property); *see also Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-9 (3rd Cir. 1977) (recognizing that "sale-leaseback arrangements play a useful and accepted role in our economy"). In construing a statute, courts may look to the conditions of the times when it was passed. *See Stern v. United States Gypsum*, 547 F.2d 1329, 1335 (7th Cir. 1977). Legislators are presumed to have knowledge of those conditions. *See Crosby v. United States*, 8 Cl.Ct. 428 (1985). That sale-leaseback transactions were used in and prior to 1978, and Congress did not act to exclude them from the coverage of § 1110, is evidence that Congress intended them to be included.

specifically identified these carriers as having trouble obtaining financing. In short, there are numerous ways Congress could have written § 1110 in order to further its apparent goal. However, the judicial task is to give effect to what Congress actually did.

Since the legislative history here does not demonstrate a Congressional purpose at odds with a literal reading of the statute, I am compelled to find that Congress mean what it said, and hold that non-acquisition leases are entitled to § 1110 protection.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	:	
	:	Case Nos. 90-932
CONTINENTAL AIRLINES, INC.	:	through 90-984
et al.,	:	
	:	Civil Action No. 91-058
Debtors.	:	

ORDER

AND NOW, this 29th day of March, 1991, in consideration of the appeals taken from the bench opinion and order issued on January 30, 1991, by the Honorable Helen S. Balick, United States Bankruptcy Judge, it is hereby ORDERED that the order is REVERSED.

BY THE COURT

/s/ Robert S. Gawthrop, III
Robert S. Gawthrop, III, J.